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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 United States of America,
10 Plaintiff,

11 v.

12 Marco Antonio Caballero-Perez, et al.,
13 Defendants.
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Case No. 2:13-cr-85-JAD-PAL

**Order re: Caballero-Perez's
Objections to the Government's
Rule 404(b) Notice [Doc. 54]**

15 Defendants Marco Antonio Caballero-Perez and Cruz Albert LaFarga are jointly charged
16 with possession with intent to distribute, distribution, and conspiracy to distribute approximately 50
17 grams of methamphetamine. Doc. 44.¹ In advance of their upcoming trial, the government provided
18 Caballero-Perez with a Rule 404(b) notice of its intent to introduce evidence of his 2012 felony
19 conviction in Colorado for possession of methamphetamine to show knowledge to support the
20 possession and distribution charges and rebut Caballero-Perez's likely defense that he was but an
21 innocent occupant of LaFarga's vehicle, unaware that it contained a large quantity of illegal
22 substance. Doc. 50 at 1. Caballero-Perez objects to the government's proposed use of his prior
23 conviction as improper character evidence lacking the similarities with the instant offenses to permit
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27 ¹ Caballero and LaFarga were originally indicted on March 12, 2013. Doc. 15. The government filed
28 a Superseding Indictment on November 12, 2013, charging LaFarga with one additional count of distribution
of approximately 5 grams of methamphetamine, two additional counts of distribution of approximately 50
grams of methamphetamine, and one count of being an immigrant in possession of a firearm. Doc. 44 at 2-4.

1 its introduction under Rule 404(b). Doc. 54.² The Court finds that the evidence is admissible under
2 Rule 404(b) to show knowledge and absence of accident or mistake and thus overrules Caballero-
3 Perez’s objections in part. Although the Court concludes that the Government should be permitted
4 to introduce admissible proof of this prior conviction if accompanied by a proper limiting
5 instruction, the Court reserves final ruling on the admissibility of this 404(b) evidence until the
6 Government has proffered the evidentiary basis for this prior conviction.

7 **Background**

8 In its 404(b) notice, the Government represents that on April 14, 2012, a Colorado police
9 officer stopped Caballero-Perez for “numerous traffic violations.” Doc. 50 at 2. Caballero-Perez
10 explained to the officer that he had borrowed the car only to drive a friend from Las Vegas, Nevada,
11 to Lincoln, Nebraska. Doc. 50 at 2. The officer obtained permission to search Caballero-Perez’s car
12 and “saw the reflection of a zipper hidden inside the factory compartment or natural void of the
13 vehicle’s dashboard.” *Id.* The compartment contained drug paraphernalia and about three grams of
14 methamphetamine. *Id.* The officer also observed “tooling marks in various locations on the vehicle,
15 and suspicious markings on the engine,” indicating that the vehicle had been used to transport
16 narcotics. *Id.* Caballero-Perez pled guilty to felony possession of methamphetamine in connection
17 with these events. Doc. 50 at 1.

18 The allegations in the current indictment put Caballero-Perez in the driver’s seat of yet
19 another vehicle with a hidden compartment concealing methamphetamine. Caballero-Perez claims
20 he “has only tenuous ties to the instant case, as well.” Doc. 54 at 3. He “was the driver of the
21 vehicle in which the methamphetamine was transported,” but he “made no arrangements to sell the
22 drugs to anyone,” “no arrangements to meet anyone anywhere for any purpose,” and “merely drove
23 a friend to various places—and did so using vehicles which were not registered to him but loaned to
24 him.” *Id.* He further explains that he was employed by a tire and auto repair facility and drove other
25 people’s cars all the time as part of his job. Thus, “[h]e did not necessarily know the people whose
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27 ² Caballero-Perez’s “objections” were not flagged in the docket as a pending motion, and the
28 Government has not responded to them. Nevertheless, in light of the pending trial the Court now offers this
ruling on the objections.

1 cars he drove—he just took them where and when they asked.” *Id.* at 5. The Government contends
2 that evidence of Caballero-Perez’s methamphetamine-possession conviction in Colorado will prove
3 the knowledge he now disavows and show intent, opportunity, and that his actions in this case were
4 not an accident or mistake. Doc. 50 at 4-6. Caballero-Perez argues that the fact that this is a
5 trafficking case makes the scope of the two incidences too dissimilar to allow the prior conviction
6 into evidence, and he notes that the Government has not yet identified what evidence it intends to
7 rely upon to prove this prior conviction. *Id.*

8 **Discussion**

9 Under Federal Rule of Evidence 404(b)(1), “Evidence of a crime, wrong, or other act is not
10 admissible to prove a person’s character in order to show that on a particular occasion the person
11 acted in accordance with the character.”³ However, Rule 404(b)(2) allows this evidence for other
12 purposes, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity or
13 absence of mistake or accident.”⁴ Rule 404(b) is generally regarded as “a rule of inclusion—not
14 exclusion.”⁵ The Ninth Circuit will deem evidence admissible under Rule 404(b) if it is not overly
15 remote in time, tends to prove a material point, shares similarities to the charged offense, and is
16 based on sufficient evidence.⁶

17 **A. The prior conviction is not too remote in time.**

18 Defendant does not contend that the prior conviction is too remote in time to permit
19 its introduction. The government represents that the facts that underlie that conviction occurred on
20 April 14, 2012, and Caballero-Perez pled guilty to that offense in August 2012. Doc. 50 at 2. The
21 acts alleged in the instant case started in the same year and occurred from September 2012 through
22 February 2013. These acts are sufficiently close in time to allow evidence of the prior conviction
23 under Rule 404(b).

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25 ³ Fed. R. Evid. 404(b)(1).

26 ⁴ *Id.* at 404(b)(2); *see Huddleston v. United States*, 485 U.S. 681, 685 (1988).

27 ⁵ *United States v. Curtin*, 489 F.3d 935, 944 (9th Cir. 2007).

28 ⁶ *United States v. Banks*, 514 F.3d 959, 976 (9th Cir. 2008) (quotation omitted).

1 **B. The prior conviction is material and its underlying facts are sufficiently similar to the**
2 **instant charges.**

3 The heart of the parties' instant disagreement is whether Caballero-Perez's
4 methamphetamine-possession conviction is sufficiently similar to the instant charged crimes to make
5 it material and allow its introduction under Rule 404(b) to show knowledge, intent, opportunity, or
6 lack of mistake or accident.⁷ A "user quantity" drug conviction may be introduced to show that the
7 defendant knows what the substance is and how it is identified.⁸ "Evidence of prior involvement
8 with drugs is [also] relevant to prove absence of mistake or accident."⁹ And the Ninth Circuit has
9 "consistently held that evidence of prior possession or sale of [a narcotic drug] is relevant under
10 Rule 404(b) to issues of intent, knowledge, and absence of mistake or accident in a prosecution for
11 'possession of, importation of, and intent to distribute narcotics.'"¹⁰

12 The government's notice contends that Caballero-Perez's 2012 guilty plea is substantially
13 similar to his pending charges, such that it can be introduced to knowledge. Doc. 50 at 1. The
14 government argues that there is ample similarity between the two events, such that evidence of the
15 2012 conviction can be introduced to show that Caballero-Perez's probably knew he was driving
16 LaFarga to the scene of a drug transaction. Doc. 50 at 4.

17 Caballero-Perez disagrees for several reasons. First, he claims that the conviction and the
18 instant offense are not sufficiently similar to warrant inclusion because "[t]hree grams of
19 methamphetamine is a world of difference from two to six pounds of the substance," as the former
20 could be considered "personal use," whereas the latter could not. Doc. 54 at 2. Moreover,
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23 ⁷ The government refers to both "motive, knowledge, lack of mistake, [and] intent," and also to
24 "knowledge, intent, and lack of mistake." Doc. 50 at 1. Since the government does not advance any
25 arguments for why "motive" should play any role in the decision, and references only in passing the fact that
these activities show a pattern, the Court declines to consider whether the evidence can be used to establish
Caballero-Perez's "motive" or whether the two activities show a pattern of conduct.

26 ⁸ See *United States v. Ramirez-Robles*, 386 F.3d 1234, 1243 (9th Cir. 2004).

27 ⁹ See *United States v. Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992).

28 ¹⁰ *Hegwood*, 977 F.2d at 497 (quoting *United States v. Mehrmanesh*, 689 F.2d 822, 832 (9th Cir.
1982)).

1 Caballero-Perez only pled guilty to *possessing* methamphetamine in his 2012 conviction—not to
2 *trafficking* it. *Id.* at 3.

3 The Ninth Circuit panel in *United States v. Bibo-Rodriguez*¹¹ considered and rejected similar
4 arguments in a prosecution for cocaine trafficking. The defendant was arrested for importing 682
5 kilograms of cocaine in a concealed compartment in the roof of the truck he abandoned. The
6 government introduced evidence that the defendant also transported marijuana “across the border in
7 the hollowed-out side panels of a Chevy Vega hatchback” as “proof that he knew the truck he was
8 driving on [the date of the instant offense] contained cocaine.”¹² On review, the Ninth Circuit panel
9 concluded that “the transportation of marijuana goes to prove knowledge that he was transporting
10 drugs in September, a material issue in the [cocaine] case,” and disregarded the defendant’s
11 argument that the different participants and types of drugs made the acts “too dissimilar to be
12 relevant.”¹³ The panel reasoned:

13 Bibo–Rodriguez transported cocaine across the border in a vehicle’s roof panel. The
14 subsequently transported marijuana was similarly hidden in the hollowed out side
15 panels of a vehicle. The evidence of the December marijuana transaction indicated
16 that Bibo–Rodriguez was not duped during the September transaction and therefore
17 he must have known that he was carrying cocaine. Moreover, the evidence of
transporting marijuana is highly probative and does not unfairly prejudice
Bibo–Rodriguez. The district judge, therefore, did not abuse his discretion in finding
the evidence relevant and admissible to show Bibo–Rodriguez knew that he was
carrying 678 kilograms of cocaine across the border on September 26, 1988.¹⁴

18 Similarly, in *United States v. Howell*,¹⁵ the Ninth Circuit held that a defendant’s prior conviction for
19 possession of cocaine was admissible in a possession-with-intent-to-deliver-cocaine prosecution to
20 rebut his innocent-motive defense that he was “merely present” on a Greyhound bus with a duffle
21 bag of cocaine unwittingly situated in his overhead compartment.

23 ¹¹ *United States v. Bibo-Rodriguez*, 922 F.2d 1398, 1402 (9th Cir. 1991).

24 ¹² *Bibo-Rodriguez*, 922 F.2d at 1399, 1401.

25 ¹³ *Id.* at 1401.

26 ¹⁴ *Id.* at 1402. *See also United States v. Ramos-Atondo*, 732 F.3d 1113, 1123-24 (9th Cir. 2013)
27 (evidence of prior conviction for alien smuggling introduced in criminal prosecution of drug smuggling, to
show knowledge of smuggling techniques).

28 ¹⁵ *United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000).

1 Allowing evidence of Caballero-Perez’s 2012 methamphetamine-possession conviction
2 under 404(b)(2) to show his general knowledge of methamphetamine and its transportation in
3 concealed vehicle compartments, and to show absence of mistake or accident, is consistent with
4 Ninth Circuit jurisprudence. Although the quantities of the current and prior offenses are different
5 in scope,¹⁶ the unique circumstances of each event—both of which involved cars Caballero-Perez
6 drove, and which contained hidden compartments concealing methamphetamine—provide sufficient
7 similarities to make the prior conviction material to rebut Caballero-Perez’s defense theory that he
8 was entirely unaware that the car he was driving was concealing methamphetamine. Accordingly,
9 the Court overrules defendant’s objection in this regard and finds that competent and otherwise
10 admissible evidence of the prior conviction should be admitted to prove knowledge and absence of
11 mistake or accident, upon the Government’s submission and prior court approval of a proper
12 limiting instruction.

13 However, the evidence may not be introduced to prove intent. “Prior drug use is not
14 ordinarily relevant under Rule 404(b) to prove conspiracy and possession with intent to distribute
15 narcotics.”¹⁷ Although the government points to *United States v. Vo*¹⁸ to support its proposition that
16 it is the character of the actions taken, and not the amount of narcotics in question, that governs the
17 court’s inquiry, *Vo* is inapposite because in that case the Court considered an extension of the same
18 conduct: selling drugs.¹⁹ Caballero-Perez correctly points out that his prior conviction pertained
19 only to a use-level amount of methamphetamine, for which there is no indication he was convicted
20 of possession with the intent to *distribute*, such as can be inferred from the 2- or 6-pound amounts
21 currently at issue. Caballero-Perez’s 2012 Colorado conviction may not be introduced to show that
22 he intended to engage in the conduct alleged in Counts 1, 5, or 6. Thus, the Court sustains
23 Caballero-Perez’s objection in this respect.

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25 ¹⁶ See *Ramirez-Robles*, 386 F.3d at 1243.

26 ¹⁷ *Ramirez-Robles*, 386 F.3d at 1243; see *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1015 (9th
27 Cir. 1995); *United States v. Mehrmanesh*, 698 F.2d 822, 832 (9th Cir. 1982).

28 ¹⁸ *United States v. Vo*, 413 F.3d 1010 (9th Cir. 2005).

¹⁹ *Id.* at 1017-19.

1 **C. The conviction is admissible under Rule 403**

2 Even if admissible under Rule 404(b)(2), a prior conviction is subject to exclusion under
3 Rule 403 if “its probative value is substantially outweighed by a danger of one or more of the
4 following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
5 needlessly presenting cumulative evidence.”²⁰ The Court is obligated to consider the prejudicial
6 effect of any evidence sought to be introduced.²¹ “Rule 403 requires the proponent to show that the
7 probative value of the proffered evidence is not substantially outweighed by the danger of unfair
8 prejudice.”²² The district judge enjoys “wide latitude in determining the admissibility of evidence
9 under this standard.”²³

10 The Government asserts that Caballero-Perez’s prior conviction is not so inflammatory or
11 provocative that introduction of the same will not unduly influence or prejudice the jury. *Id.* at 6.
12 Caballero-Perez claims that because there is so little evidence in this case of Caballero-Perez’s guilt,
13 beyond his mere presence at the scene of the crime, that evidence of his prior convictions may
14 unduly prejudice the jury. *Id.* at 4. The Court agrees that introduction of this drug-possession
15 conviction is not inherently inflammatory, as it does not “provoke[] an emotional response in the
16 jury or tend[] to adversely affect the jury’s attitude wholly apart from its judgment as to his guilt or
17 innocence of the crime charged.”²⁴ Any potential prejudice can be mitigated with a proper limiting
18 instruction, which must accompany the introduction of Caballero-Perez’s prior conviction at this
19 trial.

20 **D. The Court reserves its final ruling on the admissibility of this evidence pending the**
21 **receipt of sufficient evidence of the prior conviction.**

22 Finally, Caballero-Perez notes that the government “alleges” all of the facts about this prior
23 arrest and conviction “without providing any police reports or other substantiation for those facts,”

24 ²⁰ Fed. R. Evid. 403.

25 ²¹ *See Old Chief v. United States*, 519 U.S. 172, 182 (1997).

26 ²² *United States v. Savinovich*, 845 F.2d 834, 837 (9th Cir. 1988).

27 ²³ *United States v. Kinslow*, 860 F.2d 963, 968 (9th Cir. 1988).


28 ²⁴ *United States v. Fagan*, 996 F.2d 1009, 1015 (9th Cir. 1993) (quotation omitted).

1 such as a “certified copy of the judgment of conviction.” Doc. 54 at 1. Indeed, the Government
2 does not identify what evidence of this prior conviction and its underlying factual basis will be
3 offered to prove this prior act. The absence of this information prevents the Court from determining
4 whether the methamphetamine-possession conviction is based on sufficient evidence to permit its
5 admission under Rule 404(b)(2). Admissibility of the prior conviction evidence will be
6 preconditioned upon the Government’s proffer of competent evidence; unless and until such
7 evidence has been proffered, the Court cannot allow the admission of this evidence. Accordingly,
8 the Court reserves its final ruling on the admissibility of this evidence pending the Government’s
9 proffer of sufficient evidence of the prior conviction and its underlying facts.

10 **Conclusion**

11 **IT IS THEREFORE ORDERED** that Caballero-Perez’s Objections to the Government’s
12 Rule 404(b) notice [Doc. 54] are **OVERRULED** as stated herein. However, the Court reserves
13 decision on the ultimate admissibility of this evidence until after the Government has proffered
14 sufficient evidence of the prior conviction and a proper limiting instruction.

15 DATED: March 6, 2014.

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18 JENNIFER A. DORSEY
19 UNITED STATES DISTRICT JUDGE
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